

11/14/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 12
RLS/TAF

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shelia Monique May d.b.a. MayCo II Entertainment

Serial No. 75/534,652

Christine Karol Roberts, Esq., for Shelia Monique May.

Kevon L. Chisolm, Trademark Examining Attorney,
Law Office 109 (Michael Hamilton, Managing Attorney).

Before Simms, Hohein and Chapman, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Shelia Monique May, d.b.a. MayCo II Entertainment
(applicant), has appealed from the final refusal of the
Trademark Examining Attorney to register the mark SEELEY
for audio compact discs, audiocassettes and videocassettes
featuring children's stories.¹ The Examining Attorney has
refused registration on the ground that applicant's
asserted mark does not function as a trademark indicating

¹ Application Serial No. 75/534,652, filed August 11, 1998, based upon allegations of use and use in commerce since January 1993. Applicant amended the application to seek registration on the Supplemental Register on September 27, 1999.

origin of applicant's goods but merely identifies a featured character of the stories contained in and appearing on applicant's goods.²

Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

Noting that the name "SEELEY" appears next to an angelic cartoon-like character on one of applicant's specimens (a CD label, shown below), the Examining Attorney

² The Examining Attorney has refused registration under Sections 1, 2, 3 and 45 of the Act, 15 USC §§1051, 1052, 1053 and 1127. However, because the Examining Attorney accepted applicant's amendment to the Supplemental Register, refusal under Sections 1, 2 and 3, which pertain to the Principal Register, is not appropriate. Rather, refusal should have been made under Section 23 of the Act, 15 USC §1091, which pertains to the Supplemental Register. See *In re Eilberg*, 49 USPQ2d 1955, 1956 n. 2 (TTAB

contends that, while the name of a real or fictitious person may be registrable as a trademark if the name is used as a mark in connection with the goods to identify and distinguish those goods from those of others, here applicant's specimens fail to demonstrate that the name functions as a trademark. The Examining Attorney points to the language on one of applicant's specimens that "Yesterday's tales are portrayed in the vivid voice of an awkward yet heavenly little angel 'Seeley.' Seeley takes kids into a world where faith and honesty prevail, good triumphs over evil, and childhood fears are conquered." The Examining Attorney maintains that the commercial impression created by the name "SEELEY" on applicant's specimens is that of a character (or narrator) in applicant's fairytales. Therefore, the asserted mark does not function as a trademark identifying and distinguishing applicant's goods.

Applicant, on the other hand, maintains that, while the name SEELEY is the name of a character or narrator of applicant's fairytales, it also has the dual role as a trademark indicating source of applicant's goods. Applicant points to the CD label showing an angelic figure,

1998). This technical defect is not critical, however, because applicant fully understood the nature of the refusal.

below and to the left of which is the designation "SeeleyTM". Applicant argues that consumers will discern that "SEELEY" is also intended to function as a trademark. Further, applicant argues that the prominent display of a mark is not necessary to establish trademark use because the Act does not require any particular size or degree of prominence.

As the Examining Attorney has recognized, the name of a fictitious character may be registrable as a trademark if the name is used in the manner of a trademark to identify the goods and distinguish them from those of others. *In re DC Comics, Inc.*, 689 F.2d 1042, 215 USPQ 394 (CCPA 1982); and *In re Caserta*, 46 USPQ2d 1088, 1090 (TTAB 1998). But, as the Examining Attorney has noted, not all words, designs and symbols used in connection with goods function as trademarks. *In re Chicago Reader Inc.*, 12 USPQ2d 1079, 1080 (TTAB 1989). One must, of course, look to the specimens of record in order to determine whether or not the asserted mark functions as a trademark to identify and distinguish applicant's goods from those of others and in order to ascertain the commercial impact created by the asserted mark. *In re Caserta, supra*, at 1090 n. 4; *In re Hechinger Investment Co. of Delaware Inc.*, 24 USPQ2d 1053, 1056 (TTAB 1991); and *In re Chicago Reader Inc., supra*.

Here, we are in agreement with the Examining Attorney that applicant's asserted mark will likely be perceived only as identifying a character, specifically the narrator of applicant's fairytales, and not as a trademark indicating origin of the goods in applicant. In this regard, the name SEELEY is shown in close proximity to the depiction of an angelic-like figure and, in addition, it is clear from applicant's specimens that this is the name of the narrator of applicant's fairytales. See, for example, *In re Caserta, supra* (FURR-BALL FURCANIA unregistrable because it is merely part of a title and identifies the principal character in applicant's children's books and periodical publications); and *In re Scholastic Inc.*, 223 USPQ 431 (TTAB 1984)(THE LITTLES, as used in the title of each book, would be viewed as identifying the main character in the book). Further, contrary to applicant's contention, the mere use of the designation "TM" next to a name or symbol does not make that term or symbol a trademark. *In re Caserta, supra*, at 1090. Rather, it is the commercial impression as a whole which one gleans from the specimens of record from which this determination is made. And, as noted above, that impression is that this name functions merely to identify the narrator of applicant's stories.

Ser. No. 75/534,652

Decision: The refusal of registration is affirmed.